

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 22 December 2004**

Case No.: 2004-LHC-0930

OWCP No.: 5-63907

In the Matter of

MICHAEL R. COUTLIS,  
Claimant

v.

NORFOLK SHIPBUILDING  
AND DRY DOCK CORPORATION,  
Employer

Appearances:

Ralph Rabinowitz, Esq.  
For Claimant

Dana Rosen, Esq.  
For Employer

Before: LARRY W. PRICE  
Administrative Law Judge

**DECISION AND ORDER**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (hereinafter the Act), 33 U.S.C. § 901 et. seq. brought by Michael R. Coutlis (Claimant) against Norfolk Shipbuilding & Dry Dock Corporation (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Newport News, Virginia on July 29, 2004. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibit (JX) 1
2. Claimant's Exhibits (CX) A – I
3. Employer's Exhibits (EX) 1 – 12.



Based on the following stipulations of the parties at the hearing, the evidence introduced, and the arguments presented, I find as follows:

I. Stipulations

1. That on December 17, 1987, Claimant was in the employ of Employer, and that liability of Employer for payment of workers' compensation benefits was self-insured by Employer.
2. That on December 17, 1987, while performing services in the course and scope of employment, Claimant sustained injuries.
3. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act.
4. That a timely Notice of Injury was given by Claimant to Employer.
5. That a timely Employer's First Report of Injury was filed with the Department of Labor.
6. That Employer has provided medical services to Claimant in accordance with the provisions of Section 7(a) of the Act.
7. That Claimant's date of birth is March 16, 1951.
8. That Claimant's average weekly wage at the time of his injury was \$1,027.00, resulting in a compensation rate of \$616.96.
9. That Claimant last worked for Employer on March 24, 2000.
10. That Claimant was removed from Employer's employment rolls effective June 27, 2002.
11. That Claimant reached maximum medical improvement on May 4, 2003.
12. That on April 6, 2004, Employer voluntarily agreed to pay Claimant permanent partial disability retroactive to May 4, 2003, date of maximum medical improvement, and continuing.
13. That on April 7, 2004, Employer filed an Amended LS-208, Notice of Final Payment, Box 14, showing that permanent partial disability would be paid from May 4, 2003, and continuing, in the amount of \$464.00 per week.



## II. Issues

Whether Claimant is limited to permanent partial disability because Employer has demonstrated the availability of suitable alternative employment in the open market.

## III. Statement of the Case

### **Claimant's Testimony**

Claimant was injured on December 17, 1987 while working as a night shift superintendent for Employer's Brambleton Plant. (Tr. 22). After the injury, Claimant had to undergo orthopedic surgery on his right hip. (Tr. 23). Over the course of a couple operations, Claimant had screws and straps inserted into his hip, two fusions with pins in his back and a wire in the sleeve of his aorta. (Tr. 28). Claimant remained out of work for fifteen months, until he took another position with Employer. Claimant's new position was a planner in the Materials Control Department. (Tr. 25). This position allowed Claimant to move around in order to keep his back and hips loose. (Tr. 25-26).

Claimant's last day as an employee of Employer was March 24, 2000, and he has not worked for anyone since that date. (Tr. 28). Claimant asserts that since leaving Employer, he has submitted two hundred resumes to various employers. However, he has not been offered a job during this time.

In 2003, the doctors placed work limitations on Claimant. These included not lifting more than fifteen pounds, limited bending, little walking, limited sitting, wearing a back brace, using a chair with a back, no vertical ladders, no uneven surfaces, no night work and avoiding extreme temperatures. (Tr. 30). Also in 2003, Claimant was taking a variety of medication. This included Tylox, Fioricet, Ultram, Oxycodone, Tramadol, Prednisone, and Zanaflex. (Tr. 37). Claimant testified that these medications also had some consequences, such as disorientation and fatigue.

Claimant also testified as to his interactions with Mr. Robert Edwards, Claimant's rehab counselor appointed by the government, and Ms. Barbara Byers, a vocational counselor. Claimant asserted Mr. Edwards was easier to work with because he was less opinionated. (Tr. 32). He also found Mr. Edwards research to be more detailed because it provided the names and numbers for Claimant to contact for employment. Conversely, Claimant found Ms. Byers to give minimal information and he believed many of the employers she suggested Claimant contact were outside either his educational or work restrictions. (Tr. 34).

Claimant testified as to his use of Ms. Byers' labor market survey of October 2003. He asserted that he contacted Dollar Tree, a potential employer according to Ms. Byers. However, the manager told him it was useless to send in his resume because he did not have adequate experience. (Tr. 40-41). Claimant also testified that the position with Express Check Advance had requirements outside his limitations and



required experience beyond Claimant's background. (Tr. 46). Similarly, the positions with Chrysler Museum and Virginia Brighton Gardens required more standing and walking than Claimant thought he was capable of doing without pain. (Tr. 46). Claimant testified that he was also denied the three positions he applied for with Geico. (Tr. 44). Next, Claimant stated that the position at Barefoot Shoes was already filled when he inquired about a position with them. (Tr. 41). Claimant also stated he contacted @Lantec Financial Credit Union and New Bell Storage Co., but never heard back from them. (Tr. 42).

Claimant testified as to his sessions with Dr. Taylor in 2003 to deal with his emotional problems. (Tr. 47). Claimant found the first two sessions helpful in dealing with the frustration and pressure he was feeling. However, Claimant asserted that his third session with Dr. Taylor was much different. (Tr. 47). The focus of this session concentrated more on why Claimant was unemployed. After this session Claimant changed therapists.

Currently, Claimant still complains of pain and numbness in his left leg, pain in his hip and burning in his back. (Tr. 52). He discussed how he was able to install a fence in his yard at home, but only with frequent rests and with help for the more intensive tasks. (Tr. 51). Emotionally, Claimant asserted that he is improving. (Tr. 52). Furthermore, Claimant stated he has made a good faith effort to find employment. He asserts that he applied for hundreds of jobs throughout the last couple of years. The only time Claimant claims he was not diligent was from December 2003 to February 2004, when he was ill. (Tr. 75).

On cross-examination, Claimant verified that he limited his availability for employment to day shifts Monday through Friday. (Tr. 54). He confirmed that no doctor placed these restrictions on his employment opportunities. (Tr. 62). He also verified that he had rejected Ms. Byers' assistance in seeking employment because he felt he was obligated to work through the Department of Labor. (Tr. 56). Claimant also discussed how he terminated his treatment session with Dr. Taylor, and began working with Mr. McGuire, a family therapist, but he did not feel it was necessary to notify employer of this change. (Tr. 57).

Also on cross-examination, Claimant reviewed correspondence between him and Mr. Edwards. In five letters between December 11, 2003 and January 13, 2004, Mr. Edwards provided Claimant with a variety of potential jobs. These jobs included fourteen described as cashier work or telephone-oriented work. (Tr. 66). However, Claimant verified that he had told Mr. Edwards he was not interested in telephone or cashier jobs. (Tr. 69).

### **Testimony of Barbara K. Byers**

Ms. Byers has a bachelor's degree in psychology, a master's degree in rehabilitation counseling and a postgraduate degree in psychology. (Tr. 79). She is certified as a rehabilitation counselor, vocational evaluator, case manager, and a



professional counselor in Virginia and North Carolina. (Tr. 79). She is under contract as a vocational specialist with the Social Security Administration. (Tr. 79). Furthermore, she is an active member of the Virginia Association of Rehab Professionals. (Tr. 80). Ms. Byers has been a certified vocational counselor with the Department of Labor since the early 1980's. (Tr. 80).

Ms. Byers first met with Claimant on December 18, 1998. At this time she completed a vocational evaluation and a labor market survey. (Tr. 81). The survey was updated in March of 2000 and the job descriptions were given to Claimant. In 2001, Claimant was again referred to Ms. Byers, who completed a labor market survey identifying jobs for Claimant. Lastly, in 2003, Claimant was again referred to Ms. Byers, but Claimant personally notified Ms. Byers that he did not wish to use her services. (Tr. 82). Ms. Byers estimated she identified a total of forty jobs that were suitable for Claimant. (Tr. 84).

After providing Claimant with the list of potential employers, Ms. Byers did a follow-up to determine whether or not Claimant applied. Ms. Byers testified that she found Claimant had applied for two jobs. (Tr. 85). She also found that Claimant had at least once put his work restrictions on his resume, despite her advice not to. (Tr. 86).

On cross-examination, Ms. Byers discussed which restrictions on Claimant's ability to work were used when creating the labor market survey. Ms. Byers testified that she relied on Dr. Byrd's restrictions. (Tr. 99). She also affirmed that she felt all the positions on her survey were within these restrictions and Claimant was capable of performing them.

### **Deposition of Robert D. Edwards**

Mr. Edwards is a certified vocational rehabilitation counselor. Claimant was referred to Mr. Edwards by the Department of Labor on January 2, 2002. (CX I at 5). Mr. Edwards testified that Claimant would have difficulty finding employment because he needed to wear a back brace at all times and he was taking pain medication. He also testified that Claimant had become less employable because Claimant had additional surgeries and the length of time he was unemployed was increasing. On cross-examination, Mr. Edwards verified that the recommendation for a special modified chair for Claimant was based on his own opinion and not that of Claimant's physician. (CX I at 31). Mr. Edwards also confirmed that he believed the Department of Labor closed the file on the rehabilitation efforts of Claimant because Dr. Byrd had indicated that he thought Claimant was totally disabled. (CX I at 26).

On January 7, 2004, Mr. Edwards completed a vocational rehabilitation report on Claimant. On cross-examination Mr. Edwards testified that he called the employers on the report to verify whether Claimant had applied for their job openings. Mr. Edwards confirmed that he contacted Celeste at American Funds, GEICO Direct, and Automated Management Systems and none of these employers had any record of Claimant filing an application. (CX I at 35-36). Mr. Edwards also confirmed that Claimant limited his



availability to Monday through Friday during the day. (CX I at 43). Mr. Edwards completed another vocational evaluation report on February 10, 2004. He testified that this report summarized employers he had contacted to verify if Claimant had applied for their positions. Specifically, Mr. Edwards contacted the City of Suffolk, Hampton Roads Transportation, Victory Nissan, Tidewater Mac, Wards Corner Exxon and Consumer Portfolio Services, all of which could not confirm that Claimant had applied for their open positions. (CX I at 44-45).

Also on cross-examination, Mr. Edwards confirmed that Claimant had expressed a strong disinterest in telephone jobs and cashier jobs. (CX I at 48). These reservations did limit the number of possible jobs that Claimant would be willing to take. Mr. Edwards, however, did stress that he still considered Claimant a cooperative client. (CX I at 50).

### **Report from Barbara K. Byers (EX 7)**

Ms. Byers provided a labor market survey concerning potential employment for Claimant, which was most recently updated on October 30, 2003. Ms. Byers was asked by Dr. Byrd to meet with Claimant and review potential jobs that Ms. Byers was able to find. The actual jobs, however, would not be approved by Dr. Byrd until an offer was extended to Claimant.

The most recent survey contained eleven positions that Ms. Byers found appropriate for Claimant. A position as warehouse manager with Dollar Tree had light physical demands with no lifting. The job entailed establishing operational procedures and keeping warehouse inventory current. These tasks are classified as light duty. The position was full time and paid \$15.00 per hour. Ms. Byers also found a position with Barefeet Shoes as a manager trainee. This position required the employee to assist in day to day operations and coordinate the activities of a retail store. This is also within Claimant's restrictions and is a full time position. The pay ranged from \$10.00 to \$12.00 per hour. There was also a full-time managing position with Express Check Advance, which had similar responsibilities. The employer was also willing to provide any necessary training for Claimant. This job paid \$12.00 to \$14.00 per hour.

Ms. Byers found several customer service representative positions with @Lantec Financial Federal Credit Union, City of Norfolk and Geico. These positions involved interaction with customers, usually over the telephone. The employee must answer customers' questions and investigate any complaints. The pay ranged from \$9.05 to \$16.83 per hour. Ms. Byers also found another sedentary position with New Bell Storage Co. as a dispatcher. The job required the employee to assign vehicles to drivers and maintain records for the employer. This was also a full time position and the pay was between \$10.00 per hour and \$12.50.

The survey also listed a position as a security guard with Chrysler Museum of Art. This position involved patrolling the premises and ensuring the area is secured. Claimant also has sufficient education for the position. The job is full time and pays



\$8.00 per hour. Lastly, Ms. Byers found a full-time position as Director of Environmental Services with Virginia Beach Brighton Gardens, which paid \$15.00 per hour. In this capacity the employee supervises and coordinates activities of workers engaged in maintaining and repairing physical structures on employer's grounds. This is classified as a light physical demand.

### **Medical Records of Dr. J. Abbott Byrd, III**

Dr. Byrd is a certified orthopedic surgeon who first saw Claimant for an evaluation of a herniated lumbar disc. (CX B-1.1). In 1993 Dr. Byrd participated in a series of back surgeries on Claimant. As of 1999, Dr. Byrd placed the following permanent restrictions on Claimant: twenty-five pounds lifting; limited bending, sitting, standing; no vertical ladders; and no working on uneven surface restrictions. (CX B-18). In 2002, after finding moderate stenosis at the L3-4 level above the previous decompression and fusion at L4-5, Dr. Byrd added the restriction of Claimant using chairs with a back. (CX B-24).

In August 2003 Claimant met with Dr. Byrd to discuss his work situation. In his notes, Dr. Byrd stated that "unless I am able to review a specific job description for a job that is available I am not going to release the patient to work." (CX B-38). Dr. Byrd also noted that Claimant reached maximum medical improvement on May 4, 2003. (CX B-42). Furthermore, on April 12, 2004, Dr. Byrd found Claimant to be "permanently and totally" disabled. (CX B-43).

### **Medical Records of Drs. William Espejo, Glenn C. Nye, Hormoz Azar & Anilkumar Patel**

Claimant became Dr. Espejo's client in 1991. (CX F-6). In 1993, Claimant had heart surgery for a dissecting aortic aneurism. Based on this history, Dr. Espejo stated that Claimant should not be required to work the night shift. (CX F-6). In 1998, Dr. Espejo revised these restrictions to also include no lifting of fifty pounds or more and avoiding extreme weather changes. (CX F-7). These restrictions were all affirmed by Dr. Patel, Claimant's current physician who started treating Claimant when Dr. Espejo retired. (CX F-10).

### **Records of Dr. Felix M. Kirven**

Dr. Kirven is a board certified orthopedic surgeon practicing in Virginia. (EX 3). Dr. Kirven examined Claimant on April 23, 2004 and provided an orthopedic medical evaluation for back pain and left leg pain. (EX 3). After examining x-rays on Claimant's spine and hip and reviewing previous medical records, Dr. Kirven found that Claimant could return to light-duty work. (EX 3). Ms. Byers then sent Dr. Kirven a list and descriptions of possible jobs for Claimant. Dr. Kirven found Claimant was capable of working several of these positions because they were within Claimant's physical restrictions. (EX 3).



## **Records from Dr. Lewis J. Taylor**

Dr. Taylor is a licensed psychologist and therapist in Virginia practicing with Hampton Roads Behavioral Health. (EX 1). Claimant was referred to Dr. Taylor by his attorney. Employer authorized and agreed to pay for treatment by Dr. Taylor. Dr. Taylor summarized his analysis of Claimant as showing signs of a “depressed mood.” (EX 1). His diagnosis was “Adjustment Disorder with Depressed Mood.” (EX 1). After a couple sessions, Claimant terminated treatment with Dr. Taylor. Dr. Taylor stated that Claimant had become angry after Dr. Taylor encouraged Claimant to consider the pros and cons of returning to work and discussed the therapeutic value of work. (EX 1).

## **Reports from Gerice Escueta**

Ms. Escueta is the rehabilitation specialist with the Office of Worker’s Compensation. On March 19, 2002, she approved rehabilitation services for vocational assistance concerning Claimant. (EX 10). Claimant agreed to cooperate with efforts to locate suitable alternative employment. On February 26, 2004, Ms. Escueta closed Claimant’s file, noting that Claimant had completed the job placement efforts with mixed results. (EX 10). Ms. Escueta also noted that Claimant limited his employment prospects. Specifically, she mentions that Claimant “continues to only be agreeable to working day hours Monday through Friday, which further limits his already limited employment prospects.” (EX 10).

## **Report from Wilbur Ladson, Wilburton Investigations, Inc.**

A two day surveillance was conducted on Claimant to determine his current physical status. The surveillance was conducted in the vicinity of Claimant’s residence. An investigator observed Claimant on November 28, 2000, November 29, 2000 and December 2, 2000. (EX 11). The investigator found Claimant to move naturally with no visible braces or medical supports. (EX 11). The investigator also observed Claimant install a fence on his property. (EX 11).

### **IV. Discussion**

#### **A. Suitable Alternative Employment**

The Parties agree that Claimant has established a prima facie case of total disability. (Tr. 20). Once a claimant makes a prima facie case, the burden of production shifts to the employer to establish the existence of suitable alternative employment for which the claimant could realistically compete if he diligently tried. Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 542 (4th Cir. 1988) (citing Trans-State Dredging v. BRB, 731 F.2d 199, 200 (4th Cir. 1984)). An employer can establish suitable alternative employment by offering an injured employee a light duty job which is tailored to the employee’s physical limitations, so long as the job is necessary and claimant is capable of performing such work. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171 (1986); Darden v. Newport News



Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986). Alternatively, an employer must show the existence of realistic job opportunities which the claimant is capable of performing. New Orleans (Gulfwide) Stevendores v. Turner, 661 F.2d 1031 (5th Cir. 1981).

The employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for claimant in his geographic area. Royce v. Erich Constr. Co., 17 BRBS 157 (1985); see also Williams v. Halter Marine Serv., 19 BRBS 248 (1987). For job opportunities to be realistic, the employer must establish the precise nature and terms of each job and pay for the alternative jobs. Moore v. Newport News Shipbuilding & Dry Dock Co., 7 BRBS 1024 (1978). The employer must produce evidence of realistically available job opportunities within the claimant's local community which he is capable of performing considering his age, education, work experience and physical restrictions. Trans-State Dredging v. BRB, 731 F.2d 199 (4th Cir. 1984).

The United States Court of Appeals for the Fourth Circuit has held that an employer meets its burden by "demonstrating the availability of specific jobs in a local market and by relying on standard occupational descriptions to fill out the qualifications for performing such jobs." Universal Maritime Corp. v. Moore, 126 F.3d 256, 265 (4th Cir. 1997). When referencing a labor market through a labor market survey to establish suitable alternative employment, an employer must "present evidence that a range of jobs exists which is reasonably available and which the disabled employee is realistically able to secure and perform." Lentz v. Cottman Co., 852 F.2d 129, 131 (4th Cir. 1988). If a vocational expert is only able to identify one employment position, "it is manifestly unreasonable to conclude that an individual would be able to seek out and, more importantly, secure that specific job." Id. The purpose of the survey is to determine whether suitable work is available for which the claimant could realistically compete. Tann, 841 F.2d at 543. The employer may meet this burden of showing suitable available employment by "presenting evidence of jobs which, although no longer open when located, were available during the time the claimant was able to work." Id.

To demonstrate suitable alternative employment, Employer offered the testimony and labor market survey of Barbara Byers, which was completed on October 30, 2003. (EX 7). Ms. Byers identified several positions on her survey. Based on the descriptions provided by Ms. Byers these positions are all within Claimant's work restrictions. These positions were all available as of October 30, 2003 and each paid anywhere between \$8.00 per hour and \$16.83 per hour. Furthermore, Ms. Byers contacted each employer on her survey in order to verify if the job was available, to determine whether it was within Claimant's restrictions and to see if the employer would consider Claimant.

A position as warehouse manager with Dollar Tree was available as of October 10, 2003 and paid \$15.00 per hour. The job required establishing operational procedures and inspecting warehouse inventory. The physical demand of the position is described as light, well within Claimant's restrictions. Ms. Byers also identified a



position as assistant manager with Barefeet Shoes and branch manager with Express Check Advance, where the duties included answering telephones and balancing the cash drawer. The position with Barefoot Shoes paid between \$10.00 and \$12.00 per hour and the position with Express Check Advance paid between \$12.00 and \$14.00 per hour. All of these managerial positions are suitable for Claimant.

Ms. Byers found numerous customer service or sales associate positions with @Lantec Financial Federal Credit Union, City of Norfolk, and GEICO, which were all suitable for Claimant. These positions paid, \$10.00 - \$12.00 per hour, \$9.05 per hour and \$12.24 - \$16.83 per hour respectively. The positions are all sedentary and require the employee to answer questions from customers and have some knowledge of computers. Claimant's education is sufficient and the positions are not outside his physical limitations. Ms. Byers also located another sedentary job as a dispatcher with New Bell Storage Co., which was suitable for Claimant. This dispatcher position paid between \$10.00 and \$12.50 per hour.

I also find that the unarmed security guard position with Chrysler Museum of Art is suitable alternative employment. This position required the guard to patrol the building and premises of the employer. There is some light physical demand; however, it is within Claimant's physical limitations and paid \$8.00 per hour. Lastly, Ms. Byers noted an opening with Virginia Beach Brighton Gardens as Director of Environmental Services, which paid \$15.00 per hour. This supervisory position required the employee to maintain and repair physical structures, the grounds and utility systems of buildings on the premises. This is also suitable employment because Claimant has the necessary education and supervising experience that is required for this job.

This survey demonstrates that a range of jobs existed in the Hampton Roads area, which were reasonably available, and which Claimant could have realistically secured and performed. See Lentz v. Cottman Co., 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). The conclusions drawn by Ms. Byers in the survey are creditable, as she has demonstrated that she was aware of Claimant's age, education, work experience and physical limitations when she explored the local opportunities. See Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985). Moreover, Ms. Byers contacted each of the employers and found that the positions were available when the survey was conducted. The investigation by Wilburton Investigations, Inc. and Dr. Kirven's report support Ms. Byers' conclusion that Claimant was able to work. Mr. Ladson's investigation showed that Claimant is able to move around and do some activities without the aid of his back brace. (EX 11). Dr. Kirven also concluded that based on Claimant's medical records, Claimant could return to light-duty work. (EX 3). This evidence demonstrates that Claimant is capable of performing the tasks involved in light-duty positions such as a security officer or customer service. The survey demonstrates that even without additional training or education there is suitable alternative employment for Claimant which will pay \$8.00 per hour. Using a forty-hour work week estimate, this figure yields a weekly wage earning capacity of \$320.00.



Therefore, I find that Employer has satisfied its burden of showing that suitable alternative employment for Claimant existed as of October 30, 2003. In the survey, Ms. Byers has identified specific available jobs, which Claimant is capable of performing and which will pay at least \$8.00 per hour. Ms. Byers has also provided sufficient descriptions of each position to demonstrate that Claimant could reasonably perform them given his education, work restrictions and physical restrictions.

#### B. Diligent Job Search

Claimant may nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available and must establish a willingness to work. Turner, 661 F.2d at 1043.

The evidence does not support a finding that Claimant conducted a diligent job search. For example, Ms. Byers testified that Claimant had only applied for two of the positions she mentioned as potential employers. (Tr. 99). Ms. Byers also testified that Claimant placed his work restrictions on his resume, despite her advice that this would decrease Claimant's chances of finding employment. (Tr. 86). Furthermore, Claimant testified as to how he limited his own availability when searching for a job. No doctor restricted Claimant's availability to Monday through Friday, however, Claimant told employers he was not available to work weekends. (Tr. 57). In fact, Ms. Escueta, a rehabilitation specialist with the Office of Worker's Compensation noted that Claimant was limiting his own employment prospects. (EX 10). She specifically mentioned that Claimant is restricting these prospects by only agreeing to work Monday through Friday. (EX 10).

The evidence also shows that Claimant continued to limit his search for employment when working with Mr. Edwards. Mr. Edwards testified that he contacted many employers he had suggested to Claimant, but many of them had no record of Claimant applying or inquiring about a job opportunity. (CX I at 35-36, 44-45). Furthermore, Claimant refused to consider cashier jobs or jobs using the telephone even though they are within his physical restrictions and Mr. Edwards had found fourteen of these positions. (Tr. 66, 69). Also, Claimant voluntarily told some potential employers of his disabilities, despite knowing this could greatly reduce his chance of gaining employment.

To demonstrate diligence, Claimant testified that he contacted several hundred employers over the last couple years. (Tr. 64-65). However, he was unable to name any of these employers and he kept no records of who he contacted and what information he had given them. (Tr. 65). Claimant also stated that he contacted employers recommended to him by both Mr. Edwards and Ms. Byers. According to his testimony, after he talked to these employers he believed that many of these positions were outside of his physical restrictions. (Tr. 40-46). However, when Ms. Byers and



Mr. Edwards contacted these employers, they were told there was no record of Claimant inquiring about possible employment. (Tr. 85; CX I at 35-36). Furthermore, the descriptions provided in the labor market surveys clearly describe light-duty activity that Claimant is physically capable of performing. Conversely, Claimant has offered no corroborating evidence for his assertions. Thus, this testimony is too vague and evasive to satisfy Claimant's burden of persuasion.

The Benefits Review Board (Board) views factors, such as an inadequate independent search or not following up on a vocational counselor's research, as indications of a less than diligent search by claimants. The Board has specifically relied on vocational expert testimony that a claimant had independently limited his search by rejecting potential employers that were clearly within his physical and educational restrictions and by exhibiting a generally negative attitude towards identified jobs. See Jones v. Geneco, Inc., 21 BRBS 12 (1988) (stating that the testimony of a vocational rehabilitation specialist is substantial evidence in support of a finding of suitable alternative employment). Based on this type of expert testimony the Board has determined whether a claimant's independent search is less than sufficient. Claimant in the instant case has rejected jobs which the vocational experts found and which he was capable of performing. His negative attitude towards telephone jobs, cashier positions, and working on the weekends, are unreasonable restrictions. Also, Claimant has not offered sufficient evidence to demonstrate an adequate search independent of the vocational experts. This evidence demonstrates a lack of diligence.

### C. Conclusion

The evidence submitted by Claimant does not convince me that he diligently sought suitable employment. Therefore, because Employer has established that suitable alternative employment was available and Claimant has not established that he diligently sought employment, I find that Claimant has failed to establish total disability.

## ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1. Claimant was paid compensation at the appropriate rate prior to May 4, 2003.
2. Employer shall pay Claimant permanent total disability compensation from May 4, 2003 until October 30, 2003 based on an average weekly wage of \$1,027.00.
3. Employer shall pay Claimant permanent partial disability compensation from October 31, 2003 and continuing based on an average weekly wage of \$1,027.00 and his post-injury weekly wage earning capacity of \$320.00.
4. Employer shall pay all reasonable and necessary medical expenses.



5. Employer shall receive a credit for all amounts of compensation previously paid to Claimant.
6. Employer shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961.
7. Within thirty days of receipt of this Order, counsel for Claimant should submit a fully-documented fee application, a copy of which shall be sent to opposing counsel, who shall have twenty days to respond.
8. All computations of benefits and other calculations which may be provided for in this order are subject to verification and adjustment by the District Director.

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LARRY W. PRICE  
Administrative Law Judge

LWP/TEH